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Due Process: Applicability to Utility Rates

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Court on this question. The problem with *Powers* is that its limited discussion of the issues does not give the Missouri attorney adequate criteria by which to judge an interest in a pension plan in a dissolution case. What is clear is that until an appellate court adequately deals with the question, only those pension rights that are considered vested are divisible as marital property in Missouri.

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DUE PROCESS: APPLICABILITY TO UTILITY RATES

State ex rel. Jackson County v. Public Service Commission[1]

On August 5, 1974, the Missouri Public Service Company submitted to the Missouri Public Service Commission an increased rate schedule for electric service provided to its Missouri customers. The resulting rate increase caused a constitutional challenge to Missouri's rate-increase procedures.

Missouri statutes provide for two means of effecting utility rate changes—the "file and suspend" method[2] and the "complaint" method.[3] The "file and suspend" method of revising rates allows the utility company to file new rates with the PSC and, unless they are "suspended" by the Commission, the new rates will go into effect thirty days after they are filed. The Commission is authorized to notify the public of the proposed rate increase and can also hold hearings on the necessity for such increase, but neither "notice" nor "hearing" is *required* before approval of the new rates. The consumers challenged the validity of the "file and suspend" method as a denial of due process under the fourteenth amendment. The Missouri Supreme Court upheld the constitutionality of the method.

The supreme court stated that the due process test consisted of two steps: first, a determination of whether there is a protected interest, and

1. 532 S.W.2d 20 (Mo. En Banc 1975).
2. § 393.140(11), RSMo 1969.
3. § 386.390, RSMo 1969. The complaint method provides that complaints as to the reasonableness of any rates may be made by consumers to the PSC. The complaint must be signed by the mayor, the president, chairman of the board of aldermen, or the majority of the council of any town or city that complains or by not less than twenty-five consumers or purchasers of such utility service. Once a complaint is submitted to the PSC, a hearing on the reasonableness of the rates is required.

second, if there is a protected interest, a determination of whether the interest of the state outweighs the interest of the individual. The court stated that the first part of the test was determinative, and held that the Due Process Clause was inapplicable because there was no protected "property" interest in existing levels of utility rates. A concurring opinion of Judge Bardgett and a dissenting opinion of Chief Justice Seiler stated that although a consumer may not have a property right in a *specific* rate, he does have a right not to be charged *unreasonable* rates, and he should be afforded notice and an opportunity to be heard prior to implementation of the increased rates.

In deciding whether the Due Process Clause has been violated by the "file and suspend" method, it must first be determined that such rate increase procedure is state action, for the fourteenth amendment applies only to actions by the state.[4] A factual determination must be made on a utility by utility approach applying established tests.[5] In *Jackson v. Metropolitan Edison Co.*,[6] the United States Supreme Court held that certain activities of a particular public utility were *not* state action. The test for state action established in that case was whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[7] In *Ihrke v. Northern States Power Co.*,[8] the Eighth Circuit set up seven considerations to determine if a regulated company's actions are to be considered state action.[9] In light of these *Ihrke* considerations, it appears there is a sufficient relation between the rate increase procedures of Missouri public utilities and the state of Missouri for those procedures to be considered "state action."[10]

Once state action is deemed to exist, the measure of protection afforded the individual's interest must be determined. Originally, protection of an interest by the Due Process Clause depended upon whether that interest was

4. *See, e.g.*, Jackson v. Metropolitan Edison Co., — U.S. —, 95 S. Ct. 449 (1975); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Shelly v. Kraemer, 334 U.S. 1 (1948).

5. *Compare* Ihrke v. Northern States Power Co., 459 F.2d 566 (8th Cir. 1972) *and* Condosta v. Vermont Elec. Coop., Inc., 400 F. Supp. 358 (D. Vt. 1975) *with* Jackson v. Metropolitan Edison Co., — U.S. —, 95 S. Ct. 449 (1975) *and* Lucas v. Wisconsin Elec. Power Co., 446 F.2d 638 (7th Cir. 1972).

6. — U.S. —, 95 S. Ct. 449 (1974).

7. *Id.* at —, 95 S. Ct. at 453.

8. 459 F.2d 566 (8th Cir. 1972).

9. Those considerations are: (1) Is the entity subject to close regulation by a statutorily created body? (2) Must regulations be filed with the regulatory body as a condition of the entity's operation? (3) Must the regulations be approved to be effective? (4) Is the entity given total or partial monopoly by the regulatory body? (5) Does the regulatory body control the rates charged or the specific services offerred? (6) Are the actions of the entity subject to review by the regulatory body? (7) Does the regulation of the entity permit it to perform acts which it may not otherwise perform without violating state law? 459 F.2d at 568-69.

10. *See* Mayes, *Constitutional Restrictions on Termination of Services by Privately Owned Public Utilities*, 39 MO. L. REV. 205 (1974).

characterized as a "right" or as a "privilege."[11] If the interest was deemed a "right," procedural safeguards applied; but if the interest was considered to be a "privilege" there was no due process protection afforded that interest. This arbitrary distinction was eventually rejected by the Supreme Court, and other considerations became relevant.[12] The Court developed what has become known as the "entitlement theory" to determine if an interest is a sufficient "property" interest to be subject to procedural safeguards. *Board of Regents v. Roth*[13] summarized that test:

> [Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of *entitlement* to those benefits.[14]

Under this entitlement theory, the Court has extended protection to interests other than just actual ownership of real estate, chattels, or money. The Court has extended due process protection to the reception of welfare benefits under statutory and administrative standards defining eligibility;[15] to interests in continued employment by college professors where that employment is based on tenure provisions,[16] contracts,[17] or even *implied promises* of continued employment;[18] and to revocations of a prisoner's good-time credits accumulated under state law.[19] The Supreme Court in *Arnett v. Kennedy*[20] may have placed a limit on the entitlement theory of protectable interests. In that case, a civil service employee was discharged before there had been a hearing as to the necessity of his discharge. Three justices who voted in the majority recognized that the non-probationary federal employee had a legal entitlement to continued employment because the Lloyd-La Follette Act granted such employee the right not to be removed save for cause, but they also stated that the act that created the entitlement had limited it. That act specifically provided for a post-termination hearing and thus established the due process limits of the entitlement. However, the two other justices who voted with the majority rejected the idea that the statute that creates the entitlement also limits it.

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11. *See, e.g.*, Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd* 341 U.S. 918 (1951).

12. "[T]his Court now has rejected the concept that Constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.' " Graham v. Richardson, 403 U.S. 365, 374 (1971). *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

13. 408 U.S. 564 (1972).

14. *Id.* at 577 (emphasis added).

15. Goldberg v. Kelly, 397 U.S. 254 (1970).

16. Slochower v. Board of Educ., 350 U.S. 551 (1956).

17. Wieman v. Updegraff, 344 U.S. 183 (1952).

18. Connell v. Higgenbotham, 403 U.S. 207 (1971).

19. Wolff v. McDonnell, 418 U.S. 539 (1974).

20. 416 U.S. 134 (1974).

The entitlement theory does not appear to be the only test used by the Supreme Court to determine what is "property." If a person can show that he has suffered some sort of *serious* loss, the Court seems willing to extend due process protection to that interest. In *Morrissey v. Brewer*[21] the standard used to determine that an interest was protectable was that there had been a "grievous loss"; *Board of Regents v. Roth*[22]—"serious damage" to reputation and standing; *Bell v. Burson*[23]—"important interests" of licensees. The recent decision of *Goss v. Lopez*[24] seemed to combine the entitlement theory and the grievous loss theory of protectable interests. The majority of five held that students facing a temporary suspension from school were entitled to procedural safeguards because free public education was a legal entitlement created by Ohio statutes.[25] In addition to pointing to the legal entitlement of a free public education, the majority also seemed to predicate their decision on the nature of the deprivation—"education is perhaps the most important function of state and local governments."[26] The dissent conceded that there appeared to be an entitlement to free public education but felt that that alone was insufficient to confer protection. They concluded that a ten-day suspension from school was not such a "serious" deprivation as to require protection.[27]

Several cases have extended procedural safeguards to termination of utility services.[28] These cases seem to be based on the "serious loss" theory of protectable interests. The rationale of these decisions is that termination of utility services would be a serious loss to the consumer because consumers rely greatly on their electric, gas, and water services.[29] Although the utility service may be a protected interest, several state and federal cases which have addressed the issue have determined that the *rate* paid for that service is not subject to procedural safeguards. In *Sellers v. Iowa Power & Light Co.*,[30] a case relied upon by the Missouri Supreme Court in *Jackson County*, plaintiffs claimed that a rate increase without prior hearing violated due process

21. 408 U.S. 471 (1972).
22. 408 U.S. 564 (1972).
23. 402 U.S. 535 (1971).
24. 419 U.S. 565 (1975).
25. OHIO REV. CODE §§ 3313.48, 3313.64, 3313.66 (1972).
26. 419 U.S. at 576, 95 S. Ct. at 737 (Quoting Brown v. Board of Educ., 347 U.S. 483 (1954)).
27. "As it is difficult to think of any less consequential infringement than suspension of a junior high school student for a single day, it is equally difficult to perceive any principled limit to the new reach of procedural due process." *Id.* at 587, 95 S. Ct. at 749.
28. *See, e.g.*, Condosta v. Vermont Elec. Coop., Inc., 400 F. Supp. 358 (D. Vt. 1975); Palmer v. Columbia Gas Co., 342 F. Supp. 241 (N.D. Ohio 1972); Davis v. Weir, 328 F. Supp. 317 (N.D. Ga. 1971).
29. "That the plaintiff relies upon electric service in his daily life cannot be questioned; his ability to obtain heat in the winter, refrigeration and cooking of his food, and light by which he can see at night is dependent upon his receipt of electric service." Condosta v. Vermont Elec. Coop., Inc., 400 F. Supp. 358, 365 (D. Vt. 1975).
30. 372 F. Supp. 1169 (S.D. Iowa 1974).

because they were deprived of the money required to pay the increase. The Iowa district court did not categorically deny a property interest in the present level of rates[31] but stated that the plaintiffs' claim was too broadly stated to be protected by the fourteenth amendment. The Georgia district court also has refused to recognize a property interest in money required to pay for rate increases.[32] The district court acknowledged that "an increase in rates means a deprivation of a monetary sum" and that "the interest . . . is more than an 'abstract need or desire' for lower rates"[33] but denied protection to the interest because it was too general and was shared by "practically everyone." To refuse protection to an interest because it is shared by "practically everyone," seems contrary to the "grievous loss" theory. A deprivation of some "general interest" would injure a larger number of people which logically should bolster the argument for protection of that interest.

In *Holt v. Yonce*,[34] the South Carolina district court refused to recognize a property interest in the rates paid for utilities. The summary affirmance of this decision by the United States Supreme Court seems to indicate that Court's approval of the proposition that a utility rate is not property subject to due process requirements though the Court's rationale was not disclosed.

Although there may be no legitimate entitlement of consumers in any specific rate paid for utilities, it seems that the Missouri consumer does have a protectable interest in being charged a *reasonable* rate for utilities. Using the entitlement test set out in *Roth*, in which the entitlement must be created by a statute, rule, contract, etc., the Missouri consumer has a statutorily created entitlement to reasonable rates.[35] Missouri statutes require that all charges demanded by utilities be "just and reasonable"[36] and, therefore, it seems the Missouri consumer is entitled to notice and opportunity to contest the "reasonableness" of a proposed rate increase. However, if the reasoning of the plurality opinion of *Arnett v. Kennedy*[37] (*i.e.*, the statute that creates the entitlement may also limit it) is applied, the Missouri statutes may specifically limit that entitlement because a statutory remedy is afforded the consumer—the consumer can object to rates using the "complaint method."

The consumers in *State ex rel. Jackson County* might also claim a legitimate entitlement to the *specific* rate originally set by the Public Service Commission for Missouri Public Service Company because the order of the Commission setting the original rate to be charged by that company included a two year moratorium on further rate increases.[38] Based on *Roth*, this ruling of

31. *Id.* at 1172.
32. Georgia Power Project v. Georgia Power Co., 409 F. Supp. 332 (N.D. Ga. 1975).
33. *Id.* at 340.
34. 370 F. Supp. 374 (D.S.C. 1973), *aff'd mem.*, 415 U.S. 969 (1974).
35. § 393.130(1), RSMo 1969.
36. *Id.*
37. 416 U.S. 134 (1974).
38. 532 S.W.2d at 23.

the PSC seems to create an entitlement in that specific rate during the two year moratorium. The Missouri Supreme Court decided that the moratorium set by the PSC could also be removed by that body but did not discuss the issue of whether the two year moratorium created a property interest in that specific rate.

Even assuming utility rates are protectable property interests under the Due Process Clause, sufficient "process" may have been afforded Missouri consumers. *Morrissey v. Brewer*[39] indicated that a determination of the amount of process that is "due" involves a balancing of interests: "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[40] The consumers' opportunity to challenge rates through the "complaint method" may be all due process required in this "particular situation." Two state cases have held that due process requirements had been met where consumers could file rate complaints with the state regulatory bodies.[41] Also, it could be determined that due process had been satisfied because the Missouri public's interests are adequately protected by the Missouri Public Service Commission. Several Missouri cases have recognized that one purpose of that Commission is to protect the public.[42]

It appears that the Missouri Supreme Court reached the right conclusion for the wrong reason. Based on the Missouri statutes, the consumers in *State ex rel. Jackson County* did have a legitimate claim of entitlement to reasonable rates. However, sufficient procedural safeguards were afforded consumers by their opportunity to file a complaint with the Public Service Commission and the representation of the consumers' interests by that body.

Since the United States Supreme Court's 5-4 decision in *Goss v. Lopez*,[43] Justice Douglas, who voted with the majority in *Goss*, has been replaced by Justice Stevens from the Court of Appeals of the Seventh Circuit. Justice Stevens, it appears, may have the swing vote in determining how far to extend procedural safeguards. Based on several Seventh Circuit decisions in which Justice Stevens participated,[44] it appears that he has adopted the same

39. 408 U.S. 471 (1972).

40. *Id.* at 481.

41. Consumers' Organization for Fair Energy Equality, Inc. v. Department of Pub. Utils., 335 N.E.2d 341 (Mass. 1975); *In re* Allied Power & Light Co., 350 A.2d 360 (Vt. 1975).

42. *See, e.g.*, State *ex rel.* Valley Sewage Co. v. Public Serv. Comm'n, 515 S.W.2d 845 (Mo. App., D.K.C.'1974); State *ex rel.* St. Louis v. Public Serv. Comm'n, 335 Mo. 448, 73 S.W.2d 393 (En Banc 1934).

"[T]he guiding star of the public service commission law and the dominating purpose to be accomplished by such regulation [of public utilities] is the promotion and conservation of the interests and convenience of the *public*." State *ex rel.* Crown Coach Co. v. Public Serv. Comm'n, 238 Mo. App. 287, 298, 179 S.W.2d 123, 128 (K.C. Ct. App. 1944) (emphasis added).

43. 419 U.S. 565 (1975).

44. *See, e.g.*, United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975); Field v. Boyle, 503 F.2d 774 (7th Cir. 1974); Miller v. School Dist. No. 167, 500 F.2d